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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 516

J. T. ROBERTS, APPELLANT,

vs.

RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT; C. J. BARNETT, W. A. STOCKMAN, AND W. C. McINNIS, DIRECTORS OF THE RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT, AND HARRY FORSYTH, TREASURER OF BENTON COUNTY, WASHINGTON; B. J. PACIUS, IRA C. HAWLEY, AND H. S. HUGHES, COUNTY COMMISSIONERS OF BENTON COUNTY, WASHINGTON, DEFENDANTS; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN, AND H. E. DAVENPORT, INDIVIDUALLY AND AS TRUSTEES, INTERVENERS, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AGAINST JURISDICTION.

HAROLD PRESTON,
O. B. THORGRIMSON,
L. T. TURNER,
Attorneys for Appellees.

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RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT; C. J. BARNETT, W. A. STOCKMAN, AND W. C. McINNIS, DIRECTORS OF THE RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT, AND HARRY FORSYTH, TREASURER OF BENTON COUNTY, WASHINGTON; B. J. PACIUS, IRA C. HAWLEY, AND H. S. HUGHES, COUNTY COMMISSIONERS OF BENTON COUNTY, WASHINGTON, DEFENDANTS; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN, AND H. E. DAVENPORT, INDIVIDUALLY AND AS TRUSTEES, INTERVENERS, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

APPELLEES' STATEMENT AGAINST JURISDICTION.

Pursuant to Rule 12 (3) of the rules of this court, appellees submit this statement disclosing matters making against the jurisdiction of this court.

The decisions of the United States Supreme Court clearly establish the rule that to give the court jurisdiction of an appeal from a State court, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but also that the decision of such question was necessary to the determination of the cause.

Cook County v. *Calumet, etc. Canal Company*, 138 U. S. 635; 34 L. Ed. 1110; 11 S. Ct. 435.

DeSaussure v. *Gaillard*, 127 U. S. 216; 32 L. Ed. 125; 8 S. Ct. 1053.

Citizens Bank v. *Board of Liquidation*, 98 U. S. 140; 25 L. Ed. 114.

Adams v. *Russell*, 229 U. S. 353; 57 L. Ed. 1224; 33 S. Ct. 846.

In deciding this case the State Supreme Court necessarily considered the facts well pleaded in the complaint and the admissions contained in the briefs, viewed in the light of the State statutes involved and the decisions of the State Supreme Court construing the same.

It is true that appellant contended in the State Supreme Court that the State statute as applied was repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution, but appellees contend that in the case submitted to the State Supreme Court it was not in any way necessary for that court to decide the Federal question advanced by appellant.

There is no doubt as to the actual facts in the matter. They are these:

A municipal irrigation district, comprising 10,000 acres in extent, was legally formed, and it, on July 1, 1920, issued $538,000 of irrigation bonds, bearing 6 per cent interest, payable semi-annually, the principal payable in installments running from July 1, 1931, to July 1, 1940. The property in the district received special benefits in at least the full amount of the bonded indebtedness and all assessments that had heretofore been levied or are now attempted to be levied are proportionate. All assessments heretofore levied and paid by appellant were for interest alone, and no part of the $538,000 of principal has been paid.

Appellant cannot claim that the foregoing are not the actual facts, but may contend that as the case was decided in the State courts on demurrer to the complaint that all of the foregoing facts do not appear in the record here. It is our belief, however, that taking the allegations in the complaint, as well as the recital of the facts in the decision of the State Supreme Court in this case, and the admissions, express or implied, in the printed briefs on which the case was submitted to the State court, that we are warranted in claiming that this Court has a right to consider the foregoing facts in determining whether it shall take jurisdiction. It is, of course, known to all that a court in deciding cases does consider, in addition to the strictly record facts, the admissions made in both oral and printed arguments.

To now take jurisdiction and decide a question which will not apply if the case should be sent back

for retrial upon issue joined and evidence introduced which would clearly establish the foregoing facts will be but a waste of time and of no assistance in determining the actual controversy.

A review of the record shows the following:

Irrigation bonds in the total sum of $538,000, bearing 6 per cent interest, were issued July 1, 1920, to pay for the improvements made by the irrigation district. Par. VI, Complaint (R. 4).

The bonds matured in various series, commencing July 1, 1931, and ending July 1, 1940. Par. X, Complaint (R. 5).

Appellant, on his forty-acre tract, alleges that he paid a total of $1,166 in assessments in the years 1920 to 1929, inclusive, stating that said assessments were levied for the purpose of providing funds for the payment of principal and interest of the bonded indebtedness, but not alleging how much of said sum was for principal and how much was for interest. Par. XII, Complaint (R. 6).

In addition to the foregoing, the following matters are contained in the printed briefs and either expressly or impliedly admitted:

No question is raised "as to the fact that the aggregate benefits equalled the bonded debt." Appellant's Brief, p. 94. (R. 136).

> "This district contained approximately 10,000 acres. The bonded indebtedness is $538,000. Under the rule announced in the *Hartung* case it is conclusively presumed that the benefits aggregate at least $538,000. Following the presumption and the law it became the duty of

the directors to apportion the aggregate bonded indebtedness against all the land according to their respective benefits." Respondent Irrigation District's Brief, p. 7. (R. 136).

"Plaintiff alleges in his complaint that the full amount of the money procured from the bond issue was expended in the construction of the improvements. The Complaint does not allege, nor does counsel contend, that the total amount of the benefits do not equal the amount of the bond issue. Appellant does not contend that as between him and other privately owned land his land is disproportionately assessed. Appellant only alleges that his land is assessed more than the total benefits, and by benefits he evidently refers to the benefits arising from the physical improvement itself, and not the added benefit accruing to the district as a whole and to each land owner individually by virtue of the acquisition of lands by the district for unpaid assessments and the unpaid assessments on the other lands themselves, both of which elements form the basis for the secondary liability referred to in the *Hartung* case." Interveners' Brief, p. 30-1 (R. 136).

"If he is correct as to his land, then it necessarily follows that as no claim is made that his land has been assessed disproportionately, that all the land in the district has already been assessed for more than maximum benefits received, and the net result is that no part of the entire principal of $538,000 of such bonds can be collected." Interveners' Brief, p. 31-2 (R. 137).

"All the assessments heretofore paid by appellant have been for interest on the bonds. Our contention in our brief in the *Hartung* case was

that interest is not to be included in the computation of maximum assessments supported by the benefit conferred by the original improvement, but is supported by the added benefit of the extension of time allowed for payment of the original cost. This contention was sustained by the Supreme Court, and the provisions of the irrigation law providing assessments for interest held valid, though without discussing the reasons urged in its support." Interveners' Brief, p. 34 (R. 138).

"If the contention of appellant here is sustained no part of the principal of the bonds in the Richland Irrigation District will ever be paid. All owners will claim that they have paid enough interest to equal their total benefits, and the Court will under the authority of this case if appellant wins, enjoin all further assessments against those lands." Interveners' Brief, p. 36 (R. 138).

"It is true as counsel suggests that we have not contended that our land is disproportionately assessed." Appellant's Reply Brief, p. 41 (R. 138).

"No question is raised as to the legality of the formation of the district or of the inclusion of all lands within the district. Counsel concede that the aggregate benefits to the lands within the district equal the bonded indebtedness of the district and that the lands of the appellant have been benefitted to some extent. It is not contended that, as between appellant's land and other privately owned land, the former is disproportionately assessed." Opinion State Supreme Court in *Roberts* v. *Richland Irrigation District,* 69 Wash. Dec. 108, 111. (R. 44).

If, therefore, the 10,000 acres in the district were on July 1, 1920, benefitted in the total amount of the bonded indebtedness and appellant's property has not been disproportionately assessed, and all assessments paid were for interest alone, it is clear that the conclusion in the complaint that the appellant's property had already been assessed more than the total amount of its benefits is not correct.

The construction given by a State Supreme Court to a State statute is binding upon the United States Supreme Court.

Supreme Lodge K. P. v. *Meyer,* 265 U. S. 30; 68 L. Ed. 885; 44 S. Ct. 432.

Quong Ham Wah Co. v. *Industrial Accident Commission,* 255 U. S. 445; 65 L. Ed. 723; 41 S. Ct. 373.

Green v. *Frazier,* 253 U. S. 233; 64 L. Ed. 878; 40 S. Ct. 499.

American Railway Express Company v. *F. S. Royster Guano Company,* 273 U. S. 274; 71 L. Ed. 642; 47 S. Ct. 355.

Geo. O. Richardson Machinery Company v. *Scott,* 276 U. S. 128; 48 S. Ct. 264.

The following matters have been established by the State Supreme Court:

Irrigation bonds are general obligations of the district.

State ex rel. Clancey v. *Columbia Irrigation District,* 121 Wash. 79.

Kadow v. *Paul,* 134 Wash. 539.

State ex rel. Wells v. *Hartung,* 150 Wash. 590.

"An irrigation district is a public corporation having some of the powers of a municipal corporation. The bond obligation is a general corporate obligation. The land-owner is not entitled to a segregation of his share of the obligation at the time it is created, or at a later time. There is no provision in the irrigation act for a segregation at any time. The obligation is a general one and all lands within the district are subject to taxation for the payment of the entire obligation. *State ex rel. Clancy* v. *Columbia Irrigation District*, 121 Wash. 79, 208 Pac. 27; *State ex rel. Wells* v. *Hartung*, 150 Wash. 590, 274 Pac. 181.

"In 1919 there was a due adjudication of the organization of the district determining the lands to be included within the district, the amount of bonds to be issued and the interest to be paid thereon. It must be conclusively presumed, from that adjudication, as we said in *State ex rel. Wells* v. *Hartung, supra.*

> " 'that the total benefits to the lands comprised in the district were then finally adjudicated. Each tract of land within the district then become generally liable for the payment of the bonds and interest.'

"The bond obligation was established. That liability was adjudicated to be within the limits of total benefits. Under the statute (sec. 7434, Rem. Comp. Stat.), all lands within the district became and will remain subject to specific assessment, in proportion to benefits, until the obligation is paid." Opinion State Supreme Court in *Roberts* v. *Richland Irrigation District*, 69 Wash. Dec. 108, 111 (R. 45).

The district has a right to assess the deficit, caused by some of the properties not paying their assessments, upon the remaining properties.

Kadow v. *Paul*, 134 Wash. 539; S. C. 274 U. S. 175, 47 S. Ct. Rep. 561.

State ex rel. Wells v. *Hartung*, 150 Wash. 590.

Roberts v. *Richland Irrigation District*, 69 Wash. Dec. 108.

It being admitted that at the time of the issue of the bonds the land in the district had received total special benefits in an amount equal to the bonded indebtedness, it necessarily follows that as the bonds were payable over a period of years the total special benefits equalled at least the $538,000 of principal, plus the interest accruable thereon during the life of the bonds.

State ex rel. Wells v. *Hartung*, 150 Wash. 590.

The extension of time for payment of the principal certainly confers special benefits equal to the amount of the special assessments so far levied, which are for interest only, and no part of the special benefit accruing from the expenditure of the principal of the bonds has as yet been levied, thus showing that appellant's conclusion that his special benefits have already been used up is not warranted by the facts.

The questions here raised by appellant and respondent irrigation district were, as is shown by the opinion of the State Supreme Court in *State ex rel. Wells* v. *Hartung*, 150 Wash. 590, raised by the same irrigation district and by intervening land owners therein

who appeared for themselves and all other parties similarly interested, in a case involving some of the same assessments herein claimed to have been paid by appellant.

WHEREFORE it is respectfully submitted that the appeal in the above entitled cause does not come within the jurisdiction of this Court.

HAROLD PRESTON,
O. B. THORGRIMSON,
L. T. TURNER,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Appellees.

We hereby acknowledge service of the foregoing Statement Against Jurisdiction and the receipt of a true copy thereof, this 1st day of November, 1932.

C. H. FARRELL,
VENABLES, GRAHAM & HOWE,
ALBERT OLESON,
Attorneys for Appellant.

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IN THE

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OCTOBER TERM, 1932.

No. 516

J. T. ROBERTS, Appellant,

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. McINNIS, Directors of the Richland Irrigation District, an Irrigation District, and HARRY FORSYTH, Treasurer of Benton County, Washington; B. J. PACIUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants,

J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, individually and as Trustees, Interveners, Appellees.

Appeal From the Supreme Court of the State of Washington

Brief of Appellees

HAROLD PRESTON
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L. T. TURNER
Attorneys for Appellees

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Appeal From the Supreme Court of the State of Washington

Brief of Appellees

HAROLD PRESTON
O. B. THORGRIMSON
L. T. TURNER
Attorneys for Appellees

STATEMENT OF THE CASE

Appellant bases his suit, brought on behalf of himself and all others similarly situated, to enjoin the levying of assessments upon his forty-acre tract in the Richland Irrigation District upon claims made in his complaint that he has already paid assessments in excess of the benefits to his land, that the proposed levy is not made on account of or with reference to any special benefit accruing to plaintiff's property, and that the directors of the district have stated to the plaintiff that they propose to levy assessments upon plaintiff's land and other lands in the district which continue to pay their assessments until a sum sufficient has been created to pay the entire outstanding indebtedness upon the said bonds, without reference to the special benefits which have accrued to plaintiff's lands.

The foregoing claims of the appellant, however, have been in fact, as shown by the record, narrowed down to the claim that appellant is being assessed to make up deficiencies caused by the failure of other property owners of the district to pay their assessments.

To make this clear, we refer to the record as follows:

The complaint admits the formation of the district, comprising 10,000 acres in extent (Tr. 45), the decree of the court confirming the same, the incurring of an expenditure in the sum of $538,000 to pay for improvements and betterments and the issuance to pay therefor of bonds voted by the people in the district in the sum of $538,000, such bonds bearing 6% interest, payable semi-annually, the principal being payable in yearly installments commencing July 1, 1931. (Tr. 2, 3, 5.)

On page 94 of appellant's brief in the state court, it is said:

"No question is raised as to the legality of the formation of this district or of the inclusion of all lands within the district or as to the fact that the aggregate benefits equal the bonded debt." (Tr. 46.)

On page 41 of appellant's reply brief in the state court it is stated:

"It is true, as counsel suggests, that we have not contended that our land is disproportionately assessed. For the purpose of discussion, let us assume that the assessment is levied in proportion to the benefits to each individual tract, as determined by the judgment of the board." (Tr. 48.)

On page 6 of appellant's reply statement as to jurisdiction, it is stated:

"It is true, that appellant does not contend that the levy in question was not made in proportion to benefits."

The complaint further shows assessments paid by plaintiff on his 40-acre tract in various amounts for the years 1920 to 1929 inclusive amounting to $1167 and alleges that the board of directors of the irrigation district threaten to make an assessment in 1931 of $757.55 upon his land (Tr. 5, 6), paragraph XIII of the complaint alleging:

"That said assessment has been levied for the purpose of creating a fund to take up or eliminate the deficiencies in the bond interest and bond retirement funds of said irrigation district, due wholly or in part to a failure of certain landowners within the district to pay assessments which have heretofore or will hereafter be levied against lands in said district belonging to such other persons." (Tr. 6.)

The statute under which the bonds were issued and assessments levied provides that such bonds as well as all payments due or to become due to the United States or State of Washington under any contract with the district "shall be paid by revenue derived from an annual assessment upon the real property of the district and all the real property in the district shall be and remain liable to be assessed for such payments until fully paid as hereinafter provided." (Rem. Rev. St. 7434.)

The statute further provides for equalization after notice of the various assessments, such hearing being had in December of each year and the roll entirely

completed as finally equalized and filed with the county treasurer for collection on or before the 15th day of January following. (§7438-42 Rem. Rev. St.)

Section 7440 of the same statute provides that the assessment to be levied shall be sufficient to raise the ensuing annual interest on the bonds and beginning in the year preceding maturity of the first series of the bonds, a levy each year sufficient to pay such bonds as they mature. The board at the time of making the levy must also estimate the amount of all probable delinquencies and levy a sufficient amount to cover the same and a further amount sufficient to cover any deficit that may have resulted from delinquent assessments for any preceding year.

In this case it was admitted by appellant in the hearing before the supreme court and found by the supreme court in its opinion (*Roberts v. Richland Irrigation District*, 169 Wash. 156, 159), that:

"Counsel concede that the aggregate benefits to the lands within the district equal the bonded indebtedness of the district and that the lands of the appellant have been benefited to some extent. It is not contended that, as between appellant's land and other privately owned land, the former is disproportionately assessed."

Notwithstanding the broad allegations of the complaint, it is, of course, apparent that if the benefits to the whole district equal the bonded indebtedness,

and if assessments are made against appellant's property in the proper proportion for the purpose of paying that bonded debt, that there would be sufficient sum to pay the whole bonded debt were it not for deficiencies in collection, and that, therefore, the whole difficulty of which plaintiff complains is that there have been deficiencies in collection of assessments against other lands and that as required by the statute these deficiencies have been computed by the commissioners and future deficiencies estimated, and included in the assessment of which appellant complains.

Counsel, on page 10 of appellant's brief, states the question before the court as we have stated it, except that he states that the assessments were levied by the district "solely for the purpose of paying for benefits conferred upon the lands of others in the district, who have defaulted in their payments."

We are unable to agree with this statement.

In the first place, our supreme court has held that in addition to the primary benefit arising from the improvement, there is a secondary benefit arising from the acquisition of title to lands by the district for unpaid assessments and also from the uncollected delinquent assessments for which sales have not been made.

And in the second place, the purpose of the additional assessment upon appellant's lands was not in order to pay for the benefits of any other land owner, but its purpose was to meet the emergency created by the unexpected default of some land owners to pay their assessments, and, in the last analysis, was for the benefit of the land owner himself, in that without a provision in the law requiring such additional assessment to meet deficiencies, the borrowing of money upon bonds and the construction of the irrigation works would have been originally impossible.

In our statement against jurisdiction heretofore filed herein appellees set forth certain other facts contained in the briefs on file in the state supreme court, and so far as that court is concerned we think there can be no doubt that it had a right to assume that such facts were admitted. Appellant in his reply statement for jurisdiction now says that the briefs filed in the state supreme court are not properly a part of the record in the United States Supreme Court and therefore should not be considered, and argues that appellees now concede that his complaint does state a cause of action but seek to avoid a reversal by substituting an entirely different state of facts which does not appear in the record. This is not correct as we do not concede any cause of action,

nor do we ask the case to be decided on anything but the pertinent facts proper to be considered. In his opening statement as to jurisdiction in order to sustain his position appellant quoted from his own briefs in the state supreme court and cited authority to sustain the right to have such quoted matter considered by this court. We are perfectly willing that this be done but of course if considered for his benefit the same rule applies to appellees. Judges and trial lawyers alike are acquainted with the fact that very frequently questions of law are decided not only on the written record but on admissions of counsel made during argument, and we submit therefore that this court has a right to and should place itself in as near the exact position as possible that the state supreme court was in when it ruled on the case. However, taking the complaint alone, together with the opinion of the state supreme court in the *Roberts* case, we do not think appellant has stated a cause for relief under the 14th Amendment.

In the first place, appellant admits the validity of the organization of the district and the issuance of the bonds and the fact that at the time of such issuance the property in the district was benefited in the total aggregate of the bond issue; that his property received some benefit and has not been dispropor-

tionately assessed. It therefore must be considered as an admitted fact that at the time of the various levies paid or complained of by appellant the other properties in the district were also assessed in proportion to benefits. Taking into consideration the fact that appellant does not allege in his complaint what part of any of these levies is for principal, and the further fact that under the state law no levy at all had to be made for principal until the fall of 1930, we think we have a right to assume that all of the assessments levied and paid for the years 1920 to 1929 inclusive were for interest alone. In addition, from the opinion in *State ex rel. Wells v. Hartung*, 150 Wash. 590, involving the right to levy assessments for 1928 upon the lands in the Richland District, that being the case which was the basis for the decisions of both the trial and state supreme court in this case, it is disclosed that all levies made in the district for 1928 and previous years were for interest alone and were not in fact sufficient for that purpose alone. So, if extracts from the briefs certified in the record herein are not to be considered, the most that appellant can claim is that some undisclosed part of the 1929 assessment of $90 paid by him on his 40 acres, and of the $757 levy threatened to be made in 1930 might have been for principal. Appellant does not show that he filed any protest against any of the

yearly assessment rolls when they came up for apportionment and he now asks the court to grant him relief upon his bare assertion that the only portion of the $538,000 of bonded indebtedness for which he received benefits was the sum of $350, and that inasmuch as he has paid more than that sum in assessments without showing how much of such assessments so paid was for principal, that his land is now being assessed for an amount beyond benefits received.

If, however, we take the admissions of appellant and finding of the state supreme court that the entire 10,000 acres in the district were benefited in the total amount of the bonded indebtedness and that his lands have not been assessed disproportionately, then of course his benefits have not been used up as assessments, for only a small portion of the principal and interest of the bonds has yet been levied.

THE JURISDICTIONAL QUESTION

The burden is upon appellant to clearly establish the jurisdiction of this court and if the record is so ambiguous and conflicting that it does not certainly and clearly appear that a federal question was directly involved he must fail. (*Arizona Copper Co. v. Hammer*, 250 U. S. 400, 39 S. Ct. Rep. 553.) This court has stated that there is a presumption in view of the ruling in favor of the state court and only clear

usurpation warrants interference by this court. (*Green v. Frazier*, 253 U. S. 233, 40 S. Ct. Rep. 499.) It is further a principle of law about which there is no question that the decisions of the state court as to the meaning of its laws are conclusive (*Atchison T. & S. F. Ry. Co. v. Railroad Commission of Calif.*, 283 U. S. 380, 51 S. Ct. Rep. 553) and the fact that such decision may be considered contrary to its previous decisions does not present a federal question. *Patterson v. People of the State of Colorado ex rel. Atty. General*, 205 U. S. 454, 27 S. Ct. Rep. 556.

It is further the holding of this court that it will accept the meaning of a state statute as found by the state court the same as though such meaning was expressed in the statute itself, even if contrary to this court's opinion on the subject. *Supreme Lodge, K. P. v. Meyer*, 265 U. S. 30, 44 S. Ct. Rep. 432.

The Washington State Supreme Court has expressly found that under the state statute irrigation bonds are a general obligation of the district and the land owner is not entitled to a segregation of his share of the obligation and that by the confirmation proceedings had after the organization of the district and the issuance of bonds it is conclusively presumed that the land in the district is benefited in the amount of the total bonded indebtedness.

State ex rel. Wells v. Hartung, 150 Wash. 590;

Roberts v. Richland Irrigation District, 169 Wash. 156.

The question then resolves itself down to this: Is the fact that the district board is attempting to assess appellant's land for deficiencies caused by other property not paying their assessments, sufficient to show a violation of the 14th Amendment when coupled with the assertion that appellant has already paid in assessments (not showing what part was for the principal of the bonds) more than actual benefits received? It seems that this court in view of the admissions as to the total benefits received by the district and the fact that appellant's property is not disproportionately assessed and the conclusive presumption as found by the state court that the property in the district is benefited in the full sum of the bonded indebtedness, has a right to disregard the bare assertion that all special benefits to appellant's land have already been used up in assessments. The provision of the act that the district has a right to assess deficits caused by some of the properties not paying their assessments, upon the remaining property, has been directly upheld by the state supreme court in *Kadow v. Paul*, 134 Wash. 539, and *State ex rel. Wells v. Hartung*, 150 Wash. 590, as well as by this

court in the case of *Kadow v. Paul*, 274 U. S. 175, 47 S. Ct. Rep. 561. This same principle was applied in the case of *Norris v. Montezuma, etc., District*, 248 Fed. 369, holding that an additional levy could be made on all the property in the district because of the failure of some of the taxpayers to pay their levies.

And in *Orr v. Allen*, 248 U. S. 35, 63 L. Ed. 109, 39 Sup. Ct. 23, this court sustained with hearty approval the decision of the District Court of the Southern District of Ohio sustaining such a deficiency assessment notwithstanding the fact that the complaining property owner had already paid his full assessment on an appraisement for benefits. In principle the case (which we will discuss more fully in Paragraph IV of this brief) is on all fours with the case at bar.

In view of the fact that appellant says in his reply statement as to jurisdiction (p. 6) that he does not contend that the levy in question was not made in proportion to benefits and considering the holding in the case of *State ex rel. Clancy v. Columbia Irrigation District*, 121 Wash. 79, that irrigation assessments must be spread upon the lands acquired by the county through tax sale and the lands acquired by the district on delinquent irrigation assessment sales, it is clear

that appellant has received exactly the same treatment as all of the remaining property in the district and if his assessment is not sustained then all other assessments must necessarily fail and the net result would be that no part of the principal of the bonded indebtedness will be paid, although it is admitted by appellant and found by the state court that the district lands as a whole received benefits in an amount equal to the total bonded indebtedness.

The fact that those lands that do pay their assessments may temporarily have to carry a portion of the load imposed upon other property does not show an illegal assessment, especially as all of the lands which through delinquency come into district ownership are held for the benefit of the entire district and theoretically at least, the amount of all assessments so levied upon such delinquent lands will be realized from the sale thereof.

Even if a federal question is found to be present, it is the law if there is also present a non-federal ground which supports the judgment of the state court, this court will not take jurisdiction. *McCoy v. Shaw*, 277 U. S. 302, 48 S. Ct. Rep. 519; *Abie State Bank v. Weaver*, 282 U. S. 765, 51 S. Ct. Rep. 252. And this court will not inquire whether the state court decision on the non-federal ground is right or wrong where the

federal question is not evaded. *Broad River Power Co. v. State of South Carolina ex rel. Daniel*, 281 U. S. 537, 50 S. Ct. Rep. 401.

We submit that the opinion of the state court in the *Roberts* case shows such a non-federal ground present and actually decided. The opinion says:

"The benefits to the appellant's lands are not only the benefits accruing by reason of the improvements for the payment of which the district issued bonds in the amount of five hundred and thirty-eight thousand dollars. Lands acquired by the district for unpaid assessments are assets of the district. An added benefit therefrom accrues to the district as a whole and to each landowner individually. Such benefit is a basis, as are the unpaid assessments on other lands within the district, for the secondary liability to which reference is made in *State ex rel. Wells v. Hartung*, *supra*.

" 'While appellants argue that interest cannot be considered as part of the benefits for which assessments may be levied, when any lands within the district have paid as much as the total benefits, yet every tract of land within the district became then liable, not only for the principal as the amount of the benefits, but for the interest. Since it was heretofore so judicially determined, the directors have no option, under the statute quoted, but to levy assessments as the statutes specify.

" 'Nor have the land owners any right to question the assessments on the theory that they have paid assessments equalling the total amount of their benefits. The lands passing into the ownership of the district are not to be considered as liabilities, but assets. It may be that, during periods of depression in the market value of such lands, such as have pre-

vailed for some years, the lands do not appear to be assets. Their temporary exclusion from liability to pay assessments is anticipated by the provisions of the statutes we have quoted. These observations apply to intervenors Schlagel and others similarly situated, as well as to the directors of the district, in the operation of the law.'" *Roberts v. Richland Irrigation Dist.*, 169 Wash. 161.

Further on page 164 of the opinion in this case the state court held that *State ex rel. Wells v. Hartung*, 150 Wash. 590, is determinative of the case at bar. It is thus apparent from the holdings in both the *Hartung* and *Roberts* cases that the court actually found that the property owners, including the appellant, as a matter of fact received benefits sufficient to sustain the levy of the assessment in question. Further, in the *Hartung* case the opinion shows that exactly the same contest being waged here was there waged by intervening land owners appearing for themselves and all other parties similarly interested. Exactly the same allegation as to parties is contained in the complaint in the case at bar. In the *Hartung case* the assessment levied for the year 1928 was involved and the opinion shows that the intervening land owners alleged that prior to said year they had already paid in assessments levied upon their properties more than the total amount of special benefits received, and therefore the 1928 assessment was invalid,—exactly the same question as is raised by

appellant herein. The court held directly against their contention.

It is of course well established law that in actions of this kind an adverse decision in a suit by a party bringing the action on behalf of himself and others similarly situated is a bar to a subsequent action involving the same matter brought by another party within the class bringing the first action.

See:

State ex rel. Brown v. Chester, etc., Co., 13 S. C. 290;

Harmon v. Auditor, 123 Ill. 122, 13 N. E. 161;

Stallcup v. Tacoma, 13 Wash. 141;

State ex rel. Forgues v. Superior Court, 70 Wash. 670;

McIntosh v. Pittsburg, 112 Fed. 705.

From the allegations in appellant's complaint it appears he was a property owner in the district when the property owners' intervening complaint was filed in the *Hartung* case, and beyond all question he stands exactly in the shoes of the interveners in that case. The claim that the finding in the *Hartung* case was an adjudication binding upon appellant in the case at bar was raised by appellees in the state supreme court, and we submit that the finding of the state su-

preme court in the *Roberts* case that the *Hartung* case is determinative of appellants' claim, amounts to a holding that appellant was bound by the prior adjudication.

In the case of *Stallcup v. Tacoma*, 13 Wash. 141, the court held:

"A decision of the supreme court determining the legality of municipal bonds, in an action by a taxpayer in behalf of himself and all others similarly situated to restrain the city from issuing the bonds, is, in the absence of fraud or collusion, conclusive of their validity in a subsequent action by another taxpayer to restrain the city from paying interest thereon, especially when it appears from the records in the former action that the same questions involving the legality of the bonds were presented to the consideration of the court in both actions."

Also see *State ex rel. Forgues v. Superior Court*, 70 Wash. 670.

We are not unmindful of the general rule that the defense of *res judicata* must be pleaded and proved, but as is apparent from the *Stallcup* case, it is not always strictly adhered to when the facts are unquestioned and much expense and delay will be avoided by the court taking judicial notice of its own records. It is true as stated by appellant in his reply statement as to jurisdiction that there are cases holding that a trial court will not judicially notice the record in another case and that an appellate court notices

judicially those matters that the trial court is obliged to notice. In this case, however, the trial court did note the holding of *State ex rel. Wells v. Hartung* and decided in favor of appellees solely on the strength of that case, and we therefore submit that on the facts the cases cited by appellant on this point disclose a different condition of affairs, and therefore we are warranted in maintaining that the rule in the *Stallcup* case, to-wit:

> "This court will take judicial notice of its records and of what issues were presented for determination by the record in a given cause and will not entertain or consider an allegation of the character contained in paragraph seven of the complaint herein when it appears from an inspection of such record that the matters so alleged are unfounded,"

was, by the holding that the *Hartung* case was determinative of the case at bar, impliedly followed and applied by the state supreme court.

An examination of the cases cited by appellant show that they do not overrule the *Stallcup* case. While the *Stallcup* case is sometimes distinguished in later cases on the ground that a different state of facts existed, the principle there laid down is impliedly recognized as still being in effect and we are therefore warranted in asserting it is the law in the state of Washington.

The *Stallcup* case is also supported by the case of *Butler v. Eaton*, 141 U. S. 240, 11 S. Ct. Rep. 985, in which the United States Supreme Court took judicial notice of the reversal by it of a judgment which had been pleaded in bar in the federal trial court, notwithstanding the fact that there was no pleading or proof of the reversal. The court discussed at some length its right to take judicial notice of this reversal, saying as follows:

"We think, therefore, that the evidence of the judgment recovered was properly admitted as a bar to the receiver's title to recover in reference to the new stock. And it cannot be said, therefore, looking to the record in this case alone, that there is error in the judgment now before us. But, by our own judgment just rendered in the other case, the whole basis and foundation of the defense in the present case, namely, the judgment of the supreme judicial court of Massachusetts, is subverted and rendered null and void for the purpose of any such defense. While in force, an execution issued upon it, and a sale of property under such execution would have been effective. And when it was given in evidence in this case it was effective for the purpose of a defense, but its effectiveness in that regard is now entirely annulled. Are we, then, bound to affirm the judgment, and send it back for ulterior proceedings in the court below, or may we, having the judgment before us, and under our control for affirmance, reversal, or modification, and having judicial knowledge of the total present insufficiency of the ground which supports it, set it aside as devoid of any legal basis, and give such judgment in the case as would and ought to be rendered upon a writ of error *coram vobis, audita querela*, or other proper proceedings for revoking a judgment which has be-

come invalid from some extraneous matter? * * * The judgment complained of is based directly upon the judgment of the supreme judicial court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force, or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object? Upon full consideration of the matter, we have come to the conclusion that we may dispose of the case here."

Nor do we think that the claim of appellant that the questions raised in this case may be of vital interest to thousands of ranchers and that bondholders are the only ones objecting to the jurisdiction because it prevents their illegal exaction, is any reason for sustaining jurisdiction. The equities are not one-sided. Irrigation bonds are held by all classes of people throughout the United States, and the moneys realized therefrom were used for the benefit of the land owners. To now hold that land owners are not bound by any previous adjudication as to benefits and are entitled in these times of depressed values to have a new finding as to benefits, is of course to utterly destroy the value of all irrigation bonds.

THE LAW ON THE MERITS

In discussing the legal questions involved on the main question it has seemed to us unnecessary to discuss the various decisions by the Supreme Court of the State of Washington which counsel seems to contend are inconsistent with the doctrine of the decision of the supreme court in the case at bar. Whatever prior decisions may have been rendered by our supreme court the law as to the character of the irrigation assessments involved in this case is fixed by the decision in the case at bar and the decision involving the validity of earlier assessments in the same district which it followed, that of *State ex rel. Wells v. Hartung*, 150 Wash. 590.

So also as to the question discussed at some length in appellant's brief as to whether or not irrigation assessments in the State of Washington are in their nature local improvement assessments or whether they are based upon the taxing power and not solely upon benefits, we are disposed largely to ignore. Our supreme court has supported the assessments made here and it is our view that whether they be regarded as strictly special assessments based on the theory of special benefits to the land alone or whether they be based upon the general tax power they do not violate the provision of the 14th Amendment.

I.

Where a state law is attacked as violating the 14th Amendment to the Constitution of the United States, the plaintiff has the burden of demonstrating that the law is clearly unreasonable and arbitrary.

Arizona Copper Co., Ltd. v. Hammer, 250 U. S. 400, 30 S. Ct. 553.

Lawrence v. State Tax Commissioner of Mississippi, 286 U. S. 276, 52 S. Ct. 556.

II.

The authorities cited by counsel to the proposition that the assessment involved here is a violation of the 14th Amendment are found on page 41 and immediately following pages of appellant's brief.

The first case cited is that of *Norwood v. Baker*, 172 U. S. 269, 279; 19 S. Ct. 187; 43 L. Ed. 443. It is true that in the case of *Norwood v. Baker* this court said that the exaction from the owner of private property of the cost of a public improvement in any substantial excess of the special benefits accruing to him is to the extent of such excess a taking under the guise of taxation of private property for public use without compensation. This doctrine, however, was laid down in the flagrant case of an arbitrary assessment against the remainder of property (part of

which was taken by eminent domain), of the whole award made for the taking and the costs of the improvement of the street and the condemnation costs and without any opportunity to the property owner to be heard. In a number of cases decided by this court since the decision of *Norwood v. Baker* it would seem to be clear that the doctrine of the case as above stated and as contended for by counsel for appellant would not be applied except in a case of such flagrant abuse and oppression.

The next case cited by counsel in support of this point is the case of *Gast Realty and Investment Co. v. Schneider Granite Co.*, 240 U. S. 55; 36 S. Ct. 254. This case is one of equally flagrant injustice in which assessments were sought to be laid in the city of St. Louis for paving a street, the assessments being levied at some parts of the street to a depth of 100 feet and, immediately adjoining, to a depth of 400 and 500 feet, and on the opposite side of the street to a depth of 150 feet. This court held that the inequalities were so gross between the various property owners as to make the assessment void.

The next case cited is that of *Martin v. District of Columbia*, 205 U. S. 135; 27 S. Ct. 440. This was a case involving assessments in the District of Columbia to which the 14th Amendment to the Constitution

does not apply, and while the case of *Norwood v. Baker* and its rule was cited and referred to the case was decided on the construction of the statute applicable to the assessment in question.

The next case cited by counsel is that of *Hagar v. Reclamation District No. 108*, 111 U. S. 701; 4 S. Ct. 663. We find nothing in this case which supports counsel's position.

The next case cited is that of *Myles Salt Co., Inc., v. Board of Drainage Dist.*, 239 U. S. 478; 36 S. Ct. 204; L. R. A. 1918 E, 190. In this case this court held a drainage district assessment to be invalid under the 14th Amendment. The assessment was for drainage purposes. It was levied upon an island consisting of high land needing no drainage whatever, its problem being against washing and erosion, and the court found that the fact was that it was put in the drainage district solely with the view of deriving revenues from the assessment of Weeks Island and the salt deposit therein and only for the benefit of other properties.

The next case cited by counsel is that of *Phillip Wagner, Inc., v. Leser, et al.*, 239 U. S. 207; 36 S. Ct. 66, and involved a paving assessment, attacked as violating the 14th Amendment.

The court, in refusing to interfere with the assessment, said:

"In Spencer v. Merchant, 125 U. S. 345, 356, 31 L. Ed., 763, 768, 8 S. Ct. Rep. 921, this court, speaking by Mr. Justice Gray, said:

" 'In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.' [Here the court cites many cases, including *Norwood v. Baker.*] Norwood v. Baker, supra, is much relied upon by the plaintiff in error, and while this court has shown no disposition to overrule that case when limited to the decision actually made by the court, much that is said in it must be read in connection with the subsequent cases in this court already referred to. In Norwood v. Baker, a portion of a person's property, located in a village of Ohio, was condemned for street purposes, and the entire cost of opening the street, including the amount paid for the strip condemned, with the costs and expenses of condemnation, was assessed upon the abutting property owner whose land was condemned. This, it was said in French v. Barber Asphalt Paving Co., supra, was an abuse of the law and an act of confiscation, and not a valid exercise of the taxing power. Taking the decisions in this court together, we think that it results that the legislature of a state may determine the amount to be assessed for a given

improvement, and designate the lands and property benefited thereby, upon which the assessment is to be made, without first giving an opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred.

"We do not understand this to mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of landowners, because of arbitrary and wholly unwarranted legislative action."

Appellant cites the case of *Kadow v. Paul*, 274 U. S. 175, 71 L. Ed. 982, 47 Sup. Ct. 561, and quotes on page 81 of his brief the following language:

"When the operation of the law works uniformly as against all parts of the assessment district and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs as long as their benefits continue respectively to exceed their individual assessments."

An examination of that case will show that there was no contention that the assessments exceeded the individual benefits, and therefore the language of the last part of the quotation was not necessary to the decision and is therefore *dictum*.

III.

The situation in the case at bar is not like that passed upon by this court in those cases in which

the state statute has been held invalid as taking property without due process of law. Here there is no inequality between land owners, all being treated alike. So far as any assessment may exceed actual benefit resulting from the improvement itself, it is a contribution for temporary purposes and on account of unexpected emergencies arising in the administration of the affairs of the district. The added assessment is balanced by an additional benefit to the property arising from the unpaid delinquent assessments and the value of land bid in by the district as found by our supreme court in the case at bar and in the case of *Wells v. Hartung*, 150 Wash. 590. This point we will discuss later.

In any event it is not a case of arbitrary or capricious action or discriminatory in its operation. We submit that under numerous decisions of this court, most of them rendered since the decision in *Norwood v. Baker*, the irrigation law of the State of Washington under attack here does not violate the 14th amendment to the constitution of the United States.

In the case of *Houck v. Little River Drainage District*, 239 U. S. 254, 36 Sup. Ct. 58, there was involved the validity of a per acre tax upon lands within a drainage district, which tax was attacked as invalid because the land of the property owners bring-

ing the suit would not be benefited by the proposed improvement. The court held that the law was not invalid, saying in the opinion:

."The ultimate contention, then, is that the plaintiffs in error cannot be subjected to this preliminary tax of 25 cents an acre because their lands, as they insist, will not be benefited by the plan of drainage. In authorizing the tax, it is said, the legislature has departed from the principle of benefits and the tax is asserted to be protanto an uncompensated taking of their property for public use. But the power of taxation should not be confused with the power of eminent domain. Each is governed by its own principles. Mobile County v. Kimball, supra; Bauman v. Ross, 167 U. S. 548, 590, 42 L. Ed. 270, 288, 17 Sup. Ct. Rep. 966; Wright v. Davidson, 181 U. S. 371, 379, 45 L. Ed. 900, 904, 21 Sup. Ct. Rep. 616; People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 424, 55 Am. Dec. 266; Cooley, Taxn. p. 430; Lewis, Em. Dom. 3d Ed., §§ 4, 5. A tax is an enforced contribution for the payment of public expenses. It is laid by some rule of apportionment according to which the persons or property taxed share the public burden, and whether taxation operates upon all within the state, or upon those of a given class or locality, its essential nature is the same. The power of segregation for taxing purposes has every-day illustration in the experiences of local communities, the members of which, by reason of their membership, or the owners of property within the bounds of the political subdivision, are compelled to bear the burdens of both of the successes and of the failures of local administration. When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly; but even in such case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The state in its discretion may lay such as-

sessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners. (Citing cases.) And, as we have said, unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power. Wagner v. Leser, 239 U. S. 207, 60 L. Ed. —, 36 Sup. Ct. Rep. 66. We find no such arbitrary action here. It was not necessary to base the preliminary tax upon special benefits accruing from a completed plan. It cannot be denied that the preliminary work had peculiar relation to the district. The initial inquiry, whatever its result, was for the purpose of securing the reclamation of the lands of which the district was comprised. In this inquiry, all the owners were interested. *Whether the expense of ascertaining the best method of reclamation should subsequently be reimbursed when final assessments were laid according to benefits ascertained to result from the execution of the final plan presents a question of policy, and not of power.* These outlays for organization and preliminary surveys could as well be considered specially to concern the district, as constituted, as highways or public buildings or plans for the same (whether consummated or abandoned) could be said to concern counties or towns. Further, it would seem to be clear that the state could appropriately provide for meeting the preliminary expense when it was incurred, and could determine the manner of apportionment according to the interests deemed to be affected as they existed at the time. And in this view, it is not material to consider whether the area of the district might subsequently be extended, or what particular lands within it would be appropriated for ditches, reservoirs, etc., if a plan of drainage were adopted and carried out. To say that the tax could not be laid except as a result of such an inquiry would be to assert in effect that as a preliminary tax it could not be laid at all.

We know of no such limitation upon the state power. And assuming that the lands within the district, as organized, could be taxed for the purpose stated, there was manifestly nothing arbitrary in the fixing of the prescribed rate per acre." (Italics are ours).

In the case of *Tonawanda v. Lyon*, 181 U. S. 389, 21 Sup. Ct. 609, there was involved an assessment for paving levied by the front foot pursuant to a law of the state of New York, it being claimed that a statute providing for such an assessment without provision for a judicial inquiry into the value of the lands and the benefits actually to accrue to them by the proposed improvement, was unconstitutional under the 14th amendment to the United States Constitution, the claimants basing their claim on *Norwood v. Baker*, above cited. The court in denying the claim said:

"It was not the intention of the court, in that case, to hold that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have been subverted by the 14th Amendment of the Constitution of the United States. The purpose of that Amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property, as is afforded by the 5th Amendment against similar legislation by Congress. The case of *Norwood v. Baker* presented, as the judge in the court in the present case well said, 'considerations of peculiar and extraordinary hardships' amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private

property to public use, and bringing the case fairly within the reach of the 14th Amendment.

"The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances; and it is obvious, from expressions in the opinion of the trial judge, that he reached his conclusion because constrained by what he understood to be the principle established by the *Norwood Case*."

In Webster v. Fargo, 181 U. S. 394, 21 Sup. Ct. 623, which involved also an assessment by the front foot rule for grading and paving, this court said:

"It is conceded in this record that the plaintiff in error has no ground to complain of any discrimination attempted against him, either in the statutes of the state or in the proceedings thereunder, whereby the tax in question was assessed against his property. The sole contention on his behalf is that, under the decision of this court in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, all special assessments upon the basis of frontage are in violation of the 14th Amendment to the Constitution of the United States, in that they may result in the taking of property without due process of law.

"But we agree with the supreme court of North Dakota in holding that it is within the power of the legislature of the state to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, and that it was not the intention of this court, in *Norwood v. Baker* to hold otherwise."

In the case of *Miller & Lux, Inc., v. Sacramento & San Joaquin Drainage Dist.*, 256 U. S. 129, 41 Sup.

Ct. 404, there was drawn in question an assessment for the preliminary expenses incident to the establishment of a drainage district, the plaintiff contending that its lands would receive no special or direct benefits from the proposed works and that therefore the assessment conflicted with the 14th Amendment. In deciding the case the court said:

"* * * Since Houck v. Little River Drainage District (1915), 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266, the doctrine has been definitely settled that in the absence of flagrant abuse or purely arbitrary action a state may establish drainage districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits."

The following cases adopt and follow the rule of the above cases and the limitation of the doctrine of *Norwood v. Baker* established by those cases:

Detroit v. Parker, 181 U. S. 399, 21 Sup. Ct. 624;

French v. Barber Asphalt Paving Company, 181 U. S. 324, 21 Sup. Ct. 625;

Cass Farm Company v. Detroit, 181 U. S. 396, 21 Sup. Ct. 644;

Bronson v. Bush, 251 U. S. 182; 40 Sup. Ct. 113;

Valley Farms Co. v. Westchester County, 261 U. S. 155, 43 Sup. Ct. 261;

Smith v. Wilson, 13 Fed. (2d) 1007.

In the case of *Lawrence v. State Tax Commissioner of Mississippi*, 286 U. S. 276, 52 Sup. Ct. 556, there was drawn in question the validity of certain provisions of the Mississippi income tax law as infringing the 14th Amendment of the United States Constitution. The law was unequal as between individuals and corporations, the income tax being levied as to corporations exclusive of their income earned from sources without the state and including as to individuals income earned outside the state. The court held the law not invalid under the 14th Amendment. We quote from the syllabus of the case as follows:

"State income tax statute relieving domestic corporations, but not individuals, from tax on income derived from activities carried on outside state, held not to deny equal protection (Code Miss. 1930, §5033, subd. b; Const. U. S. Amend. 14).

* * *

"Equal protection clause does not require state to maintain rigid rule of equal taxation, to resort to close distinctions, or to maintain precise scientific uniformity (Const. Amend. 14)."

In the case of *Salomon v. State Tax Commissioner of New York*, 278 U. S. 484, 49 Sup. Ct. 192, there was drawn in question the validity under the 14th Amendment of a provision of the New York transfer law for taxing the transfer of contingent remainders, and this court in holding against the contention, said:

"Several other reasons are urged why the statute should be held obnoxious to the equality clause. It is said that, the tax being graduated according to amounts, there will result from the use of mortality tables discrimination between members of the same class. It is urged that, since the tax is not collected until the termination of the life estate, a more perfect equality would be achieved by assessing the tax on the value of the remainder, after deducting the value of the life estate, and allowing interest to the state for the actual known period during which the tax was withheld. The fact that a better taxing system might be conceived does not render the law invalid. As was said in Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 69, 70, 33 S. Ct. 441, 443 (57 L. Ed. 730): 'To be able to find fault with a law is not to demonstrate its invalidity. * * * The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Further, it is said that postponing payment of the tax will prove burdensome, because it involves giving security to ensure the deferred payment, and that where the security is given by the deposit of cash, the income earned thereon will probably be less than would have been earned if the money had been otherwise employed. To all such objections it may be answered that minor inequalities and hardships are incidents of every system of taxation and do not render the legislation obnoxious to the Federal Constitution."

To same effect see *People of State of New York v. Latrobe*, 279 U. S. 421, 49 Sup. Ct. 377.

In the case of *Chadwick v. Kelly*, 187 U. S. 540, 23 S. C. 175, involving a paving assessment under the laws of the State of Louisiana, based on the front

foot, the court in holding that the law did not violate the 14th Amendment of the Federal Constitution, said:

"In the opinion of the Supreme Court of Louisiana, which we find in this record, it is said:

" 'There can be no question, and in fact it is conceded, that by act No. 119 of 1886, and by that act as amended by act No. 142 of 1894, the council of the city of New Orleans was authorized, "in its discretion, to provide for the paving or banqueting of any street, or portion thereof, at the expense of the whole city, and to thereupon force, impose, and collect of the front proprietors of lots fronting on said street a special assessment in proportion to frontage of three quarters of the cost of said improvement," and that by said acts it was enacted that such local assessment should have a first privilege, superior to vendor's privilege and all other privileges and mortgages.

" 'The constitutionality of those acts is not attacked directly, but the exercise by the city of authority, under the powers so granted, is called in question as being illegal and unconstitutional. . . . . It is too late to question the right of the general assembly to establish particular districts for the attainment of special local public good, through works of a particular character, and to order itself, or authorize some political body to order, special assessments to be made, within the district, for the purpose of meeting the cost and expenses of such works. *George v. Young*, 45 La. Ann. 1232, 14 So. 137. . . . It is true that in some instances almost the whole benefit accrues to a few, but there can be no universal rule of justice, upon which such assessments can be made. An apportionment of the cost that would be just in one case would be oppressive in another. For this reason the power to determine when a special assessment shall be made, and on what basis it shall be

apportioned, rests in the legislature or some political body to which it has delegated that authority. . . . . The city has simply exercised its unquestionable right and power of paving an existing public street in the interest of the special local public benefit, and demanded of owners of property abutting and fronting on the street, that they contribute to the cost of the improvement in a manner and form and to an extent fixed by the general assembly. The object of the paving of the street was to benefit parties owning property upon it by the improvement of the access to their properties. It is not pretended that this particular purpose was not accomplished even as to appellant's property. It cannot be exacted for the purpose of sustaining the constitutionality of a statute or ordinance authorizing a work of local public improvement, at the cost of abutting owners, that it be shown there is benefit in every possible respect to the particular owners, nor that the benefit be direct and immediate. . . . . The general assembly has, in Act No. 119 of 1886, conferred upon the common council the right and power by a two-thirds vote, to constitute any particular street which it proposes to pave a special taxing district for the purpose of meeting the cost of making such paving. It has exercised this right and power in the matter of the paving of Hagen avenue. Having done so, the legislature itself has designated how, in what proportion, and by what standard this cost is to be met. The council was not at liberty to depart from this apportionment. The judiciary is not authorized to alter it and to substitute for a fixed legislative standard a fluctuating judicial standard based upon actual benefits received and measured by values or enhanced values to be established by evidence and proof.'

"We think these views are consonant with the great weight of authority, both state and Federal. As expressed by Cooley in his work on Taxation, page 429:

"The matter 'is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government be placed elsewhere. With the wisdom or unwisdom of special assessments when ordered in cases in which they are admissible, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion.' "

In the case of *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 S. C. 466, in which a lot in the city of Louisville, Ken., used for right of way of the appellant railroad's railway was assessed for grading, curbing and paving the street upon which the lot abutted, the assessment under the state law was made by the front foot. It was contended that the property was not only not benefited, but was damaged by the improvement. This court in holding the assessment did not violate the 14th Amendment of the Constitution said:

"The argument for the plaintiff in error oscillates somewhat between the objections to the statute and the more specific grounds for contending that it cannot be applied constitutionally to the present case. So far as the former are concerned they are disposed of by the decisions of this court. There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The

amount of benefit which an improvement will confer upon particular land—indeed, whether it is a benefit at all—is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district,—the municipality,—and to disguise, rather than to answer, the theoretic doubt. It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly, as was intimated in Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. Rep. 921, it is important for this court to avoid extracting from the very general language of the 14th Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted, and which it is safe to say that no one then supposed would be disturbed. It now is established beyond permissible controversy that laws like the one before us are not contrary to the Constitution of the United States. * * * *

"A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases."

This case last above cited is followed by the Supreme Court of the State of Washington in a case involving similar facts, the Washington Supreme Court supporting an assessment upon a railroad right of way for the construction of sidewalks.

Northern Pacific R. R. Co. v. Seattle, 46 Wash. 674.

In the case of *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, which is a case cited by counsel for appellant in his brief, the court in sustaining *ad valorem* assessments in an irrigation district under the Wright Act said:

"It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with and in proportion to the benefits conferred by the improvement, and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law.

"Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment, as being in violation of the state constitution, yet, as the state court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the federal constitution is shown in such an assessment. Can an ad valorem assessment on the land benefited, or, in other words, can such an assessment as is provided for in sections 18, 20, 21, and 22 of

the act, be legally levied in such a case as this? Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought, in justice, to be assessed for a greater sum than the benefits received by it; yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and, where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the federal constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law.

"In the case of Davidson v. New Orleans, 96 U. S. 106, the assessment, with which this court refused to interfere, was for a local improvement (reclaiming swamp lands); and by section 8 of the act of the legislature of Louisiana, passed in 1858 (Laws La. 1858, p. 114), such a uniform assessment was levied upon 'the superficial or square foot of land situate within the draining section or district of such board' as would pay for the cost of construction. The effect of this provision was that each foot of land in the whole district paid the same sum as any other foot,

although the assessment was founded upon the theory of an assessment for benefits. It was complained that the amount assessed upon plaintiff's lands was excessive, and that part of them received no benefit at all, and it was to that argument that the reply was made that it was a matter of detail, so far as this court was concerned, i. e., it was not a constitutional question, and therefore was not reviewable here.

"In Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, an assessment was laid upon lands for benefits received from construction of a local improvement, according to the number of square feet owned by the landowner. It was urged that it was not an assessment governed by the amount of benefits received, but was an absolutely arbitrary and illegal method of assessment. This court held the objection not well founded, and that the matter was for the decision of the legislature, to which body the discretion was committed of providing for payment of the improvement.

"We refer to the case of Cleveland v. Tripp, 13 R. I. 59, decided in 1880, as one which treats this subject with much ability. The act provided for the construction of a sewer in the city of Providence, and directed the laying of an assessment upon the abutting lands of a certain sum for each front foot, and another sum for each square foot extending back 150 feet. The claim was made that such a mode of assessment did not apply the tax in proportion to the benefits received, and was unequal and unfair, and therefore unconstitutional. The court, while admitting the complaint of inequality to be well founded, yet held the act to be within the power of the legislature.

"There are some states where assessments under such circumstances as here exist, and made upon an ad valorem basis, have been held invalid, as an infringement of some provision of the state constitution, or in violation of the act under which they were

levied. Counsel have cited several such in the briefs herein filed. We do not discover, and our attention has not been called to, any case in this court where such an assessment has been held to violate any provision of the federal constitution. If it do not, this court can grant no relief.

"The method of assessment here provided for may not be the best which could have been adopted in order to accomplish the most equal and exact justice which the nature of the case permits. But, none the less, we are unable to say that it runs counter to any provision of the federal constitution, and we must for that reason hold the objection here considered to be untenable."

IV.

VALIDITY OF ADDITIONAL ASSESSMENT TO MAKE UP DEFICIENCIES CAUSED BY DELINQUENCIES IN PAYMENT OF ASSESSMENTS

On page 72 of appellant's brief, under the heading "Analysis of the Opinion of the State Supreme Court in the Case on Appeal," counsel for appellant attacks that part of the opinion of the State Supreme Court holding that the unpaid delinquent assessments and lands acquired by the district under sale for unpaid assessments are assets of the district and create an added benefit to the district as a whole and to each landowner individually.

This doctrine was first announced by our Supreme Court in the case of *State ex rel. Wells v. Hartung*,

150 Wash. 590, in which decision the court said at page 601:

"Nor have the land owners any right to question the assessments on the theory that they have paid assessments equalling the total amount of their benefits. The lands passing into the ownership of the district are not to be considered as liabilities, but assets. It may be that, during periods of depression in the market value of such lands, such as have prevailed for some years, the lands do not appear to be assets. Their temporary exclusion from liability to pay assessments is anticipated by the provisions of the statutes we have quoted."

In the decision in this case now on appeal, this court, discussing this question, said:

"The benefits to the appellant's lands are not only the benefits accruing by reason of the improvements for the payment of which the district issued bonds in the amount of five hundred and thirty-eight thousand dollars. Lands acquired by the district for unpaid assessments are assets of the district. An added benefit therefrom accrues to the district as a whole and to each landowner individually. Such benefit is a basis, as are the unpaid assessments on other lands within the district, for the secondary liability to which reference is made in State ex rel. Wells v. Hartung, supra."

See printed Transcript of Record, p. 27.

The doctrine was laid down originally in the case of *Cosman v. Chestnut Valley Irrig. Dist.*, 74 Mont. 111, 238 Pac. 879, 40 A. L. R. 1344, in which decision, which involved an irrigation district assessment, the court said: (See pp. 1348 and 1349 of 40 A. L. R.)

"Plaintiff insists that if the faithful taxpayer must be assessed in amount sufficient to cover the delinquencies of his neighbors, his assessment will be so out of proportion to the benefits received as to constitute a violation of the principle above stated, and hence a taking of his property without due process of law and without just compensation. But plaintiff apparently loses sight of the fact that when lands are sold for delinquent assessments, the proceeds of the sale pass to the credit of the irrigation district. This money may be used in paying bonded indebtedness and thus reduces the plaintiff's next assessment. If the land is struck off to the county the irrigation district receives a debenture certificate showing the amount of its delinquent tax and its equitable interest in the land, legal title to which is in the county. Plaintiff thus is presumed to receive back in money, or in an interest of the irrigation district in the lands sold for delinquent taxes, approximately the amount which was added to his assessment to make up the delinquent taxes, and it cannot be said that his assessment is out of proportion to the benefits received. * * * *

"The faithful taxpayer will be presumed to receive some benefit from the added success of the district as a whole, which might otherwise be imperiled if the delinquencies were not met. Although referring to general taxes, we think the remarks of Chief Justice Dixon, in State ex rel. Soutter v. Madison, 15 Wis. 30, are pertinent here."

While it is true, as set forth on page 75 of appellant's brief, that after a change of the statute of Montana a different rule was laid down in the case of *State ex rel. Malott v. Board of Commissioners of Cascade County*, 89 Mont. 37, 296 Pac. 1, the supreme court of this state in its opinion in this case calls

attention to the fact that in the *Malott* case it was pointed out that the statute of Washingon was different from that of Montana, thereby distinguishing the decision of the Supreme Court of the State of Washington in *State ex rel. Wells v. Hartung.*

However, while we submit that the view of the Supreme Court of the State of Washington that an added benefit is created affording the basis for an assessment by the ownership of the district of delinquent assessments and lands acquired for sale for district assessments, it is not necessary to support a levy for deficiencies involved in this case upon that theory.

This court has supported an assessment for such a deficiency in a similar case and there are a large number of cases decided by this court and other Federal courts sustaining in principle such an assessment.

In *Orr v. Allen*, 245 Fed. 486, there was involved certain assessments under the Ohio Conservancy Act. Two objections were made, first to the levy of three-tenths of a mill on the lands of the district for preliminary expenses. As will appear by paragraph [12], p. 497, of the decision, this was supported and held valid under the rule of the case of *Houck v. Little River Dist.*, 239 U. S. 244, 36 Sup. Ct. 58.

The Ohio Conservancy Act further contained a provision providing for levies to pay the principal and interest of the bonds, and it was contended in that case that where a landowner had paid his entire assessment in full upon an appraisement of benefits to his property, he could, nevertheless, be assessed such additional amount as might be necessary to pay the principal and interest of the bonds. See 245 Fed. paragraph [14], p. 498. This case was appealed to this court and this court in affirming the decision of the lower court said:

"The appellant, a citizen of California, owning property within this district, filed his bill to enjoin the enforcement of the statute on the ground that it was repugnant to both the Constitution of the state and that of the United States. The court, organized under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, §1243]), in a careful and clear opinion disposed adversely of every proposition upon which the contention was based. The injunction was refused. This direct appeal was taken.

"All the contentions rest upon one or the other or both of two propositions: (1) That the statute is unconstitutional because of some particular provision relied upon; and (2) because of the inherent want of constitutional authority by government to exert the powers which the statute gave. The first assumes that the statute has a significance which the Supreme Court of Ohio has expressly decided it has not, and, in addition, that the Constitution of the state forbids the exertion of a legislative power which the same court has expressly held the Legislature possessed.

The second disregards a line of conclusive decisions of this court which leave nothing open for controversy, or, which is tantamount thereto, separates expressions in opinions of this court from their context in order to give to them a meaning which the opinions do not sanction and which it has been repeatedly declared would be inconsistent with the decided cases.

"Thus concluding, we think nothing is required to dispose of the controversy but to cite the two lines of cases referred to. (1) Snyder v. Deeds, 91 Ohio St. 407, 110 N. E. 1068; Miami Co. v. Dayton et al., 92 Ohio St. 215, 110 N. E. 726; Com'rs v. Gates, 83 Ohio St. 20, 34, 93 N. E. 255; State ex rel. Franklin Co. Conservancy District v. Valentine, 94 Ohio St. 440, 114 N. E. 947; (2) Houck v. Little River District, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266, and cases cited."

Orr v. Allen, 248 U. S. 35, 39 Sup. Ct. 23.

In the case of *Norris v. Montezuma Valley Irr. Dist.*, 248 Fed. 369, in the Circuit Court of Appeals of the 8th Circuit, the court supported assessments on property of one landowner for deficiencies caused by failure to pay assessments on other land, and in doing so called attention to the fact that in all taxation there was more or less inequality caused by the failure of some to pay, and that such inequalities have never been held to be a violation of the constitutional provision against uniformity of taxation, quoting largely from the case of *State v. Common Council*, 15 Wis. 30.

This decision by the 8th Circuit was brought to this court on certiorari and the writ denied.

Norris v. Montezuma Valley Irr. Dist., 248 U. S. 559, 39 Sup. Ct. 10.

On pages 54 and 55 of appellant's brief it is contended that "the rights of an individual land owner in the District were not raised," counsel then quoting a part of what was said by the court on this question. Following the quotation made by counsel the court said: "Considering the defense as one that may be made by the defendants," and then proceeds to consider the question and decide it as we have stated above. The suit being one to compel action by the commissioners to levy the assessment for the deficiency, it is perfectly clear that the question was one involved in the case and necessarily decided.

The validity of provisions of an irrigation statute permitting the assessment of the property of one land owner who has paid for the deficiencies in the fund to pay the bonds caused by the failure of other land owners to pay has almost universally been supported in the state decisions.

Noble v. Yancy, 241 Pac. (Ore.) 335, 42 A. L. R. 1178.

Clancy v. Columbia Irr. Dist., 121 Wash. 86;

Kollock v. Barnard, 242 Pac. 847 (Ore.);

Stevens v. Melville, 175 Pac. 602 (Utah);

American Falls Reservoir Dist. v. Thrall, 228 Pac. 236 (Ida.);

Nelson v. Board of Commissioners of Davis County, 218 Pac. 952 (Utah).

The last case cited is cited by appellant at page 54 of appellant's brief as not contravening appellant's position. But it is clear that in the later Utah case (*Nelson v. Board of Commissioners*) the court clearly held that so far as the statute provided, deficiencies in collection of assessments could be assessed against the paying property, the court saying at page 954:

"It would therefore seem to be conclusive that a tax levied against property in an irrigation district is governed and controlled by the benefits received by each landowner and for that reason a landowner cannot and should not be penalized further than is provided in the act for his pro rata share of delinquencies of other property owners in failing to pay the taxes assessed against their property. The statute also seems to limit the power of the county commissioners to levy any greater amount for delinquencies than 15 per cent."

V.

THE MATTER OF INTEREST

As shown from the discussion in the early part of this brief, the assessments complained of were largely, if not wholly, made to provide for interest payments upon the bonds. We submit that no property owner can complain against assessments for the payment of interest. The benefits flowing to the land were a

present benefit at the time of the advancement of the money by the bondholders and the making of the improvements. The land owner instead of paying this had the use of the money until he paid the assessment, and even if the benefits flowing from the improvements were limited to the principal of the bonds it is not an unreasonable provision nor does it take property without due process of law to require the land owner to pay interest in addition to the principal, as he has in the meantime the advantage of the money. The use of the money, or rather, the extension of time within which to make the payment for the present benefit, is an added benefit.

But as a matter of fact as shown by the decision in the case of *State ex rel. Wells v. Hartung*, 150 Wash. 600, the adjudication as to the organization of the district made in 1918 determining the lands to be therein included and the amount of the bonds to be issued and the interest to be paid thereon, was a conclusive adjudication that the total benefits to the lands in the district equalled the amount of the bonds. The bonds provided not only for principal but for interest, with its rate and time of payment. The adjudication as to the amount of benefits therefore included both principal and interest.

And as heretofore shown in this brief, it was expressly admitted by appellant in his brief in the state court in this case that the aggregate benefits equalled the bonded debt. The bonded debt included interest as well as principal.

CONCLUSION

It is well known that irrigation in Western states is the means of transforming valueless deserts into fertile valuable farms. To speak of irrigation as benefitting lands in most irrigation districts hardly gives an accurate idea of the true situation. Substantially all the value is usually created by the irrigation. The value of the unirrigated acre is usually so negligible as to be hardly worthy of consideration. Hence arises the great public interest which is affected by the irrigation statutes.

To seek to require greater accuracy of the tax laws of a state in fixing or distributing benefits created by irrigation improvements than is required in ordinary municipal improvement statutes is to make it impossible to create the improvements or finance them. Under laws providing for front foot and ad valorem assessments much greater hardships and inequalities than are claimed here, have been, and rightly, supported by this court as being within the

power of the state. There is no complaint here that there is any discrimination or inequality between property owners. All are treated on the same basis. The complaint is as to detail of administration temporary in its character. Even if it were otherwise, the provision complained of providing for assessment for deficiencies is well within the power of the state under its tax power and not inimical to the 14th Amendment.

We respectfully submit:

1. That no federal question is involved and the appeal should be dismissed.

2. That if not dismissed, the judgment of the state court should be affirmed.

Respectfully submitted,

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